Supreme Court, U.S.
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No. 00-331

IN THE

Supreme Court of the United States

BRENDA HOFHERR,

Petitioner,

v.

VISTA IRRIGATION DISTRICT, JOHN AMODEO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Is an employee who has been subjected to wrongful retaliation and demotion in violation of public policy, breach of written contract of employment and whose Constitutional rights have been violated under color of law in violation of 42 U.S.C. § 1983, entitled to recover provable consequential damages sustained as a result of her reasonable efforts to mitigate her damages by seeking other employment?

Alternatively, if such an employee may not recover damages arising from her reasonable efforts to mitigate her damages by seeking other employment, may she recover the consequential damages she would have sustained but for her reasonable but unsuccessful attempt to mitigate?

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OPINION BELOW

The *unpublished decision* of the United States District Court for the Ninth Circuit dated May 24, 2000 affirmed the findings of the United States District Court for the Southern District of California that Petitioner could not recover post-resignation damages in an action alleging wrongful demotion in violation of public policy and 42 U.S.C. § 1983. The Ninth Circuit held: "The district court ruled that Petitioner was not constructively discharged, a ruling she has not appealed. Accordingly, Petitioner cannot recover any damages incurred subsequent to her resignation." Pet. at 6a.

STATEMENT OF JURISDICTION

Respondents argue herein that the Petition for Writ of Certiorari (hereinafter "Petition") should be summarily denied for lack of jurisdiction inasmuch as the questions presented were not preserved on appeal because Petitioner failed to appeal the District Court's findings that she had not been constructively discharged, an essential factual predicate to recovery of the damages she seeks — post-resignation damages.

INTRODUCTION

Vista Irrigation District (hereinafter "VID") and John Amodeo (hereinafter "Amodeo") (collectively "Respondents") submit this brief opposing the Petition for Writ of Certiorari of Brenda Hofherr (hereinafter "Hofherr") of an *unpublished opinion* of the United States Court of Appeals for the Ninth Circuit. In that opinion, the Ninth Circuit affirmed the District Court's finding that Hofherr

could not recover post-resignation damages because she had not been constructively discharged as a matter of law, a ruling she did not appeal.

STATEMENT OF THE CASE

This is a demotion case arising out of the reclassification of Hofherr's position by VID in May of 1995. VID is a special district governmental agency that supplies the residential, commercial and agricultural water needs for San Diego's north county areas. As a major water supplier to San Diego's north county, VID employs approximately 85 persons and has a publicly elected Board of Directors. VID hired Hofherr in November of 1991 as its first Director of Safety and Training, an exempt and "permanent" position with the District.[1] Hofherr executed an employment agreement effective November 12, 1992 which set forth the terms and conditions of her employment as Director of Safety and Training. At the time of her hiring, VID's General Manager and Chief Engineer was Tom Wilson.

In February 1994, a compensation consultant from a Big Six accounting firm reviewed VID's compensation system and noted that one position was overclassified within the VID organization — the Director of Safety and Training. Mr. Wilson, who was on the verge of retirement, did not act upon that information. When Amodeo, the then-Assistant General Manager, replaced Tom Wilson as VID's General Manager and Chief Engineer in the summer of 1994, he promptly developed an action plan to reorganize VID's

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1. The term "permanent" is a statutorily defined term. Under Cal. Water Code § 21190, employees of water districts are "permanent" employees if they are employed to fill positions that normally require more than six months employment in each year.

reporting relationships into a more functional, common-sense structure. This action plan included, among other restructuring, reclassifying the Director of Safety and Training position downward, as the compensation consultant had recommended. To accomplish the reorganization, Amodeo repeatedly conferred with the Human Resources Manager and other upper-level management and also sounded out his plan with individual members of the Board of Directors. After receiving this input, Amodeo made his final reorganization decisions in December 1994.

As a final step in the reorganization process, Amodeo met with the VID Board of Directors on January 18, 1995 to inform them of the new organizational structure and revised reporting relationships. The topic was a slated item on the Board agenda, which had been posted since, at the latest, January 13, 1995. Following that meeting, on January 19, 1995 Amodeo and other members of management met with Hofherr to advise her that her position, among others, was to be reclassified. In an effort to be supportive and sensitive to Hofherr, they informed her that no specific changes would occur to her position until VID hired an Assistant General Manager, which was to happen within a month or so.[2]

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2. Despite the overwhelming evidence of the district-wide reorganization, Hofherr continues to assert that the events that actually caused her reclassification began on January 13, 1995 (the same day that the Board agenda was posted) when she allegedly met with Amodeo and reported the existence of possible contamination at the Lake Henshaw site. Pet. at 3-4. After this alleged January 13 meeting, however, Hofherr did not say one word to *anyone* at VID about Amodeo's purported "scheme" for more than two months. Then, on March 27, 1995, Hofherr, for some

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In May 1996, a new Assistant General Manager was finally hired to fill the position vacated by Amodeo, and Hofherr was formally notified on May 5, 1996 of her reclassification to the position of Safety Manager. On that day, Amodeo sent Hofherr a memorandum stating that the reclassification would take effect May 12 and would include a pay cut of approximately $14,000 per year. Amodeo and Hofherr had previously discussed the possibility of not reducing her salary, but VID ultimately decided to reduce her salary under the terms of her employment agreement.[3]

Rather than accept her demotion, Hofherr responded on May 26, 1995 with a memorandum outlining allegedly intolerable working conditions. Before VID or Amodeo could respond, Hofherr notified VID on June 13, 1995 that she was resigning her position effective June 27. All told, Hofherr worked approximately seven weeks at her reduced salary before *she quit*.

The day before she announced her resignation from VID, June 12, 1995, Hofherr accepted a job at Hallmark Circuits, Inc. to be its Environmental Health and Safety Manager. She

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unknown reason, abruptly rekindled her supposed concerns and sent a scathing letter to Amodeo accusing him of planning to tamper with the monitoring wells. Pet. at 5. Everyone, especially Amodeo, was stunned, and Amodeo immediately informed the Board of Hofherr's out-of-the-blue allegations. At the next Board meeting, the Board questioned Amodeo and various other employees in detail regarding Hofherr's allegations. After a full hearing, the Board found absolutely no wrongdoing whatsoever.

3. Contrary to Hofherr's assertions, she had not been "promised that her demotion would not include a pay cut." Pet. at 5.

began working there with no break in pay. Six months later, however, she voluntarily resigned from Hallmark Circuits when the job turned out to be less than promised. She subsequently filed this lawsuit.

REASONS FOR DENYING THE WRIT

A. NEITHER THE RECORD NOR THE DECISION BELOW RAISED THE QUESTIONS PRESENTED IN THE PETITION

The Petitioner presented two issues to the Ninth Circuit: (1) whether the District Court erred in granting summary judgment as to Hofherr's cause of action for breach of contract; and (2) whether the District Court erred in excluding evidence of plaintiff's damages. The Ninth Circuit reversed the District Court's grant of summary judgment as to Hofherr's breach of contract claim, and Hofherr does not seek review of that portion of the opinion. However, the Ninth Circuit affirmed the District Court's evidentiary ruling. In so doing, the Ninth Circuit stated in no uncertain terms that *Hofherr had not preserved the damages issue on appeal*:

> An employee cannot quit and sue for post-resignation damages without showing constructive discharge – that is, without showing that "the conditions giving rise to the resignation [are] sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job." The district court ruled that Hofherr was not constructively discharged, a ruling she has not appealed. Accordingly, she cannot recover any damages incurred subsequent to her resignation.

Pet. at 2a (alteration in original) (citation omitted).

The District Court, in its ruling on Respondents' motion for summary judgment, held that Hofherr could not raise a genuine issue of fact that she was constructively terminated: "Plaintiff resigned and there was no constructive termination." Pet. at 16b. The District Court also held that Hofherr's demotion "did not rise to the level of 'intolerable' working conditions that would constitute 'constructive discharge.' " Pet. at 15b. Hofherr did not challenge these ruling. Accordingly, under controlling California law properly applied by the District Court, Petitioner was not entitled to post-resignation damages because, by quitting her job, she had forfeited any right to recover losses beyond that point. Pet. at 3c ("The fact remains, however, that as a matter of law, she was not wrongfully terminated or constructively discharged. Plaintiff should not, therefore, be able to prove or collect damages as if she were.").

No matter how Hofherr frames the damages issue, and contrary to Hofherr's assertion, *the damages issue presented does not "subsume" the constructive discharge claim.*[4] Pet. at 8 n.4. Most assuredly, *VID concedes nothing* in this regard. *See id.* Plain and simple, the District Court found that Hofherr was not wrongfully terminated or constructively discharged. Pet. at 14-15b, 2c-3c. As a result, she is not entitled to recover post-resignation damages as a matter of law.[5] Because Hofherr failed to preserve the issue on

4. The issue Hofherr presented for the Ninth Circuit's review was: "Did the District Court err in excluding evidence of damages which were consequential to plaintiff's demotion and her reasonable efforts to mitigate her damages?"

5. Hofherr refers to these damages in her Petition as "consequential damages sustained as a result of her reasonable

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appeal, it has been waived. *See National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1, 110 S. Ct. 2892 (1990) ("We decline to consider that argument because it was not raised below.").

Assuming *arguendo* that certiorari jurisdiction is proper, and it is not, Hofherr's arguments fail on the merits as well. First, Hofherr's "post-quit" damages cannot be characterized as "consequential" damages. Consequential damages are ones that are "reasonably contemplated" by the parties. *Ericson v. Playgirl, Inc.*, 73 Cal. App. 3d 850, 854, 140 Cal. Rptr. 921 (1977). Because Hofherr's decision to quit was her own, and because this decision was ruled to be unreasonable as a matter of law, she is not entitled to recover damages flowing from the loss of her job. Indeed, it is difficult to imagine how damages incurred after Hofherr's admittedly unreasonable decision to quit her job could nevertheless be characterized as "proximate" or "consequential." The District Court eloquently disposed of Hofherr's bootstrap argument: "Any damages that flow from [Hofherr's] resignation were proximately caused by her decision to resign, not by defendants' decision to demote her, which is the only act the legality of which remains to be tested." Pet. at 3c.

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efforts to mitigate her damages by seeking other employment." *See* Pet. at i. This is a red herring. These are the same "post-quit" damages which are not available to her under controlling California law because the District Court concluded that there had not been a constructive discharge or wrongful termination. Pet. at 6a, 14b-15b, 2c-3c. Moreover, her assertion that she quit her job under the guise of "mitigating" her damages is nothing more than a ruse to avoid the constructive discharge doctrine.

In short, a plaintiff cannot simply "quit and sue" and recover damages for the loss of her job. *See Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 212, 23 Cal. Rptr. 2d 793 (1993). If Hofherr were allowed to recover these termination damages, the concept of constructive discharge would be meaningless, because any employee would quit, sue and seek to recover all damages flowing from the loss of his or her job, regardless how reasonable or unreasonable the decision to quit.

Second, Hofherr's characterization of her decision to quit as resulting from her "reasonable efforts to mitigate her damages" runs contrary to California law. Although Hofherr argues her "duty" to mitigate compelled her to quit and seek comparable employment, Hofherr's argument stands the concept of mitigation on its head. Mitigation is a defense to be used by an employer as a shield against a terminated employee's losses that otherwise would be unreasonably held against the employer. *See Chyten v. Lawrence & Howell Investments*, 23 Cal. App. 4th 607, 616, 22 Cal. Rptr. 2d 392 (1993) (burden on defendant to prove plaintiff's failure to mitigate). Mitigation is not a sword to be used by a plaintiff seeking to justify an otherwise unreasonable decision to quit her job. Moreover, the concept of mitigation requires an employee to make reasonable efforts to find comparable employment, yet the District Court, following settled California precedent, held that Hofherr's decision to quit was unreasonable as a matter of law. Pet. at 14b-15b. Because Hofherr's decision to quit was an unreasonable response to her demotion, her subsequent efforts to find employment cannot at the same time be characterized as reasonable.

Simply put, the concept of mitigation cannot and does not apply when an employee quits.[6] As the District Court noted: "Implicit in [Hofherr's] argument is the assertion that by mitigating her damages, plaintiff suffered additional injury. This argument is alien to the mitigation doctrine, which requires a plaintiff to *avoid* those damages that can be reasonably averted." Pet. at 2c n.1 (emphasis in original).

B. THE QUESTIONS PRESENTED WERE DECIDED UNDER CONTROLLING STATE LAW, AND NO FEDERAL STATUTORY OR CONSTITUTIONAL ISSUES ARE PRESENTED

Relying on well-settled California law (*see Rochlis*, 19 Cal. App. 4th at 214-15; *Warner Bros. Pictures, Inc. v. Bumgarner*, 197 Cal. App. 2d 331, 351-53, 17 Cal. Rptr. 171 (1961)), the District Court concluded that Hofherr, who had resigned, could not recover post-resignation costs. Pet. at 2c. Therefore, she was not entitled to introduce evidence of "post-quit" damages — the damages she incurred subsequent to her resignation. Pet. at 2c ("By introducing evidence of post-quit damages, [Hofherr] essentially seeks to recover the same damages that would be available had she been wrongfully terminated."). The District Court's evidentiary ruling was affirmed on appeal. Pet. at 6a ("she cannot recover any damages incurred subsequent to her resignation").

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6. To highlight the absurdity of Hofherr's "mitigation" argument, the complement would allow an employer sued for wrongful demotion to assert that an employee who had *not* quit had failed to mitigate her damages.

Hofherr asserts that "the District Court erred in its damage analysis and the Ninth Circuit erred in affirming this rule." Pet. at 8. However, Hofherr does not allege that:

> a United States court of appeals has entered a decision in conflict with the decisions of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Sup. Ct. R. 10. Nor does she allege that that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with relevant decisions of this Court." *Id.* Rather, she simply seeks this Court's review of the District Court's application of controlling California law to the issue of damages, which application was affirmed by the Ninth Circuit.

Hofherr attempts to cloak the questions presented for review with federal importance by virtue of the fact that she seeks these damages in a suit in which she alleges, in addition to state law claims, that her Constitutional rights were violated under color of law in violation of 42 U.S.C. § 1983. The fact remains, however, that no federal statutory or Constitutional issues are implicated. *This Petition arises from an order entered by the District Court, and affirmed by the Ninth Circuit, which is silent on federal law. It rests entirely on state law damages principles.*

It is well settled that the purpose of Supreme Court review is: (1) to determine important constitutional questions; (2) to interpret federal statutes; and (3) to maintain harmony among the decisions of the circuit courts of appeals and with decisions of state courts on important questions of federal law. Sup. Ct. R. 10. None of these purposes is implicated; accordingly, certiorari should be denied. *See Leavitt v. Jane L.*, 518 U.S. 137, 144, 116 S. Ct. 2068 (1996) ("we do not normally grant petitions for certiorari solely to review what purports to be an application of state law").[7]

C. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS

Hofherr requests this Court to grant certiorari "to consider the important and far-reaching question of whether an employee who is wrongfully demoted under color of law in violation of public policy and 42 U.S.C. § 1983, is entitled to recover consequential damages sustained as a result of her reasonable efforts to mitigate her damages in accordance with fundamental tort principles." Pet. at 18. Petitioner greatly overstates the significance of the Ninth Circuit's ruling.

First, the Ninth Circuit never even addressed the "important question" that Petitioner posits for review. Hofherr admits as much. *See* Pet. at 8 n.4 ("Apart from a single sentence, the Ninth Circuit fails to address the merits of the damages argument.").

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7. It is also well established that this Court typically defers to the courts of appeals regarding the application and interpretation of state law and only rarely grants review to correct errors in interpreting state law. *See, e.g., McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786, 117 S. Ct. 1734 (1997). There are no errors in interpreting state law present in this case.

Second, no persons other than the parties to this action will be affected by the Ninth Circuit's ruling because the court ordered that its "disposition is not appropriate for publication and may not be cited to or by the courts of this circuit." Pet. at 1a n.*. As such, the case does not present a "far-reaching question." In fact, the question has no "reach" whatsoever and fails to extend beyond the parochial concerns of Hofherr. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422 (1923)) (concept of importance relates to the "importance to the public, as distinguished from that of the parties").

"A petition for a writ of certiorari will be granted only for compelling reasons." Nothwithstanding Hofherr's conclusory assertion of importance and far-reach, this Petition presents no reason, let alone a "compelling reason," that warrants this Court's review.

CONCLUSION

For the reasons set forth above, Respondents VISTA IRRIGATION DISTRICT and JOHN AMODEO respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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